Supreme Court, U.S.
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No. 00-___

In The

Supreme Court of the United States

KEVIN PLEAS, WILLIAM YANCY JONES, DEMETRIUS JONES, DEMETRIUS MACK, LAMAR HOWELL, SHERDONNA JONES, and TONYA JONES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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52pp

QUESTION PRESENTED

1. Whether the following would constitute "the 'clearest proof' . . . that an in rem civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding," so that the Double Jeopardy Clause of the Fifth Amendment was implicated in the property owners' subsequent criminal prosecution: (a) the Drug Enforcement Administration case agent in charge of a drug trafficking investigation repeatedly lied in judicial applications and proceedings in order to obtain some 40 search warrants and to avoid the suspects' release on bail after arrest; (b) the 40 raids resulted in the seizure of the suspects' homes, motor vehicles, cash, and other property, and the institution of civil forfeiture proceedings against that property, but did not result in the seizure of any narcotics; (c) the case agent caused other law enforcement officials working under his supervision to lie in state court search warrant applications in two states; (d) the agent and law enforcement officials working under his direction left gratuitous property damage and disarray after conducting raids at the suspects' residential and commercial premises and engaged in unnecessary manhandling of two of the suspects; and (e) after the suspects' had been indicted, had changed their pleas from not guilty to guilty, and had acquiesced in the criminal forfeiture of the property involved in the stayed in rem civil forfeiture proceedings, counsel for the government candidly apprised the United States District Court that the civil forfeiture proceedings "were corollary civil complaints filed against those properties, but those were pending [substitute] criminal forfeiture [proceedings]."

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OPINIONS BELOW

The Court of Appeals refused to grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(B). The Court of Appeals did not issue an opinion and its order was not reported. The opinion of the District Court was not reported.

JURISDICTION

The petitioners commenced proceedings for post-conviction relief pursuant to 28 U.S.C. § 2255. After the United States District Court had denied the petitioners relief and declined to issue certificates of appealability, the petitioners filed notices of appeal to the United States Court of Appeals. The judgment of the Court of Appeals was entered on July 6, 2000. No petitioner filed a petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. V provides, in relevant part:

> "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

28 U.S.C. § 2255 provides, in relevant part:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence."

28 U.S.C. § 2253 provides, in relevant part:

"(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

* * *

"(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

* * *

"(B) the final order in a proceeding under section 2255.

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

The petitioners were prosecuted for drug trafficking and related offenses in the United States District Court for the Eastern District of Missouri. Counsel for the government and the defendants engaged in plea negotiations and the petitioners eventually entered guilty pleas and

were sentenced to terms of imprisonment. The defendants all appealed and the United States Court of Appeals for the Eighth Circuit affirmed the judgment of conviction in each of their cases. The opinion of the Court of Appeals is reported as *United States v. Pleas*, 111 F.3d 597 (8th Cir. 1997).

The petitioners filed separate motions for post-conviction relief pursuant to 28 U.S.C. § 2255. The claims asserted in their several motions were identical or virtually identical. The District Court granted a government motion to dismiss all of their claims. The District Court refused to grant any of the petitioners a certificate of appealability.

Each of the petitioners filed a notice of appeal to the Court of Appeals. Each applied to the Court of Appeals for a certificate of appealability. The arguments asserted in support of the issuance of a certificate of appealability were identical. The Court of Appeals declined to issue certificates of appealability and dismissed the petitioners' appeals.

In their motions for relief under § 2255, the petitioners claimed that their imprisonment was violative of the Double Jeopardy Clause because each of them previously had been punished by the civil forfeiture of his or her property for the very conduct which resulted in his or her sentence and incarceration. The petitioners based their claims upon the existence of clear proof that the purpose and effect of those forfeitures were punitive, despite the fact that confiscation of their property was

effected largely through in rem civil forfeiture proceedings.[1]

The petitioners apprised the District Court and the Court of Appeals that their double jeopardy claims were derived from this Court's opinion in *United States v. Ursery*, 518 U.S. 267 (1996). That opinion established or clarified a presumption that civil forfeiture proceedings brought under Titles 18 and 21 of the United States Code do not implicate the Double Jeopardy Clause. *Id.*, at 288-89. *Ursery* explained that the presumption may be overcome by appropriate evidence: "[W]here the 'clearest proof' indicates that an in rem civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause." *Id.*, at 289 n.3.

The petitioners made numerous allegations of fact in support of their claim that the Government's investigation was led by an agent whose persistent dishonesty and systematic violations of their constitutional rights – including their property and privacy rights – demonstrated the punitive purpose and effect of confiscating their homes, vehicles, cash, and other belongings in a

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[1] The petitioners also alleged that their attorneys in the criminal proceeding had been ineffective because they had failed to assert and prove this claim. The petitioners averred that in the absence of complete investigation, discovery, and an adversarial evidentiary hearing, they had been unable to discern the extent to which their inability to recognize and prove these claims was attributable to concealment of evidence by government personnel or inadequate performance by their counsel. For that reason, they asserted their claims ascribing responsibility to both.

series of more than 40 raids which produced absolutely no narcotics. In particular, the petitioners alleged:

- The agent began the unauthorized and thus illegal interception of telephone communications in which petitioner William Yancy Jones was a participant at a time when the agent had no basis for suspecting Mr. Jones or the persons to whom he was speaking of any criminal conduct.

- With no search warrant and no legitimate basis for suspicion, that agent and other law enforcement officers seized a package which Mr. Jones' friend had left for shipment at a Federal Express office and removed that package to St. Louis, Missouri, police headquarters.

- One or more of the seizing law enforcement officers applied for a search warrant and supported that warrant application with false testimony regarding purported electronic scanning of the seized package and police dog response to the scent of the package.

- The agent subsequently lied about his participation in the seizure of the package during his testimony at a succession of bond hearings in the District Court. His testimony was intended to keep the petitioners and their counsel from learning of his illegal investigative conduct and to keep the petitioners incarcerated during the pendency of the civil forfeiture proceedings and criminal prosecution.

- The agent applied for and obtained more than 40 warrants to search homes, vehicles, and other premises owned, occupied, or occasioned by the petitioners and

their families and friends. Each application was supported by an affidavit in which the agent claimed to have received information supporting a belief that drug trafficking evidence would be found from a reliable confidential informant. No controlled substance or other contraband was found in any of those raids, but neither the agent nor any other representative of the government ever apprised any of the succession of District Judges from whom they sought warrants of that fact. The affidavit submitted in support of each search warrant application included material falsehoods or omissions.

- The agent and law enforcement officers working at his direction engaged in excessive intrusiveness with respect to the properties they searched and gratuitous violence and hostility toward the petitioners. In particular, the agent and his colleagues excavated the basement of a building they searched to no avail, intentionally left neat and orderly residential and business premises damaged and in chaotic disarray, and struck or manhandled two of the petitioners without provocation or excuse.

- During his investigation, the agent interviewed and made statements to numerous individuals disclosing information about petitioner William Yancy Jones which was inimical to the welfare of each of the petitioners. As a result of those revelations, the United States Justice Department found it necessary to take special precautions to attempt to protect the lives of Mr. Jones and other petitioners within the Bureau of Prisons.

- During the investigation, the agent or other officials of the DEA or the government disclosed that same information to news broadcasting companies, causing the

information to be broadcast to the public and further endangering the lives of the petitioners.

- During a surveillance operation in this case, a local law enforcement officer who had been detailed to the DEA in California and who was operating at the direction of the case agent lied to a state court judge in a search warrant application. Other federal law enforcement personnel working at the case agent's direction were present when the misrepresentations were made and knew of their falsity, but did nothing to correct the wrong.

- During the execution of the fraudulently obtained warrant, the law enforcement personnel seized $281,000.00 in which they believed that petitioner William Yancy Jones had an ownership interest. Despite their knowledge that California law required the retention of property seized pursuant to a search warrant in the custody of the state court which issued the warrant until a judge has ordered its transfer or release, an agent working at the direction of the agent removed the money from California to Missouri without application to or authorization of any court.

The government moved to dismiss all of the motions for post-conviction relief and the District Court granted that motion. The court concluded that the in rem civil forfeiture proceedings had been an integral part of the eventual criminal prosecutions and that the Double Jeopardy Clause thus was not implicated in the latter proceedings. Both the District Court and the Court of Appeals declined to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

The petitioners have been inmates confined within the custody of the Bureau of Prisons at all times since the inception of their proceedings for post-conviction relief. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 2255. The jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 2253(a). The petitioners have elected to join in the filing of a single petition for a writ of certiorari pursuant to Sup.Ct.R. 12.4. The several judgments which the petitioners seek to have reviewed were rendered by the same court and involve identical or virtually identical issues.

REASONS FOR GRANTING THE PETITION

After the petitioners had pled guilty but before they were sentenced, this Court clarified double jeopardy doctrine with respect to civil forfeiture proceedings conducted against the property of criminal defendants. The Court held that the Double Jeopardy Clause indeed is implicated when a criminal defendant meets a stringent evidentiary standard in proving that civil in rem forfeiture proceedings directed against his property were decidedly punitive in purpose or effect. *United States v. Ursery, supra,* 518 U.S. at 288-89 n.3; *see also Hudson v. United States,* 522 U.S. 93, 100 (1997).

In their appeal from the judgments of conviction, five of the petitioners raised double jeopardy claims based upon this Court's opinion in *Ursery*. The record in the criminal case reflected little of the pattern police misconduct which the petitioners later would allege and be prepared to prove in post-conviction proceedings. The

Court of Appeals rejected the claim of constitutional wrong that had been founded upon that record. *United States v. Pleas, supra.*

In their motions for post-conviction relief, the petitioners described a stunning display of patently malicious misconduct by law enforcement officials throughout the drug investigation, civil forfeiture proceedings, and criminal prosecution. The investigation included the procurement and execution of more than 40 search warrants. The homes, motor vehicles, cash, and other property of the suspects were confiscated during those raids, despite the failure of any search to find any of the narcotics upon which each warrant application was based. The petitioners alleged that two of the suspected drug traffickers were manhandled without cause during the investigation, that orderly business and residential premises were left in chaotic disarray by law enforcement officers who continued their rampage despite the absence of any contraband, and that law enforcement officials lied to and misled judges in order to continue to procure warrants enabling their searches of the petitioners' homes and businesses and the seizure of their property. The records in the criminal case and the civil forfeiture cases establish that the government abused the relatively lax in rem civil forfeiture procedures to deprive the petitioners and their families permanently of their property, with the expressed purpose of holding that property until the petitioners changed their pleas to guilty and agreed to

acquiesce in substitution of criminal for civil forfeiture proceedings.[2]

Although *Ursery* clearly contemplates double jeopardy challenges to harshly punitive applications of traditionally civil penalties, *Hudson* clouds that notion. According to *Ursery*, the Double Jeopardy Clause is implicated when very convincing evidence establishes that civil forfeiture proceedings were "so punitive in purpose" as to be tantamount "to a criminal proceeding." *Id.*, 518 U.S. at 289 n.3. According to the majority opinion in *Hudson* – which reiterates the proposition that clear proof "will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *Id.*, 522 U.S. at 100 – double jeopardy protection may have no application in "proceedings heretofore thought to be civil." *Id.*, at 103.

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[2] Counsel for the government frankly acknowledged at a sentencing hearing: "There were corollary civil complaints filed against those properties, but those were pending the criminal forfeiture." By relying in the first instance upon the statutes governing civil forfeiture rather than those governing criminal forfeiture, and by continuing the civil proceedings until it had secured the property owners' agreements to plead guilty to criminal charges and capitulate to criminal forfeiture proceedings, the Government was able to seize each asset without providing the immediate post-seizure hearing required in criminal cases. Further, it was able to deprive the petitioners and the other property owners of their assets based simply upon probable cause to believe that the properties had been involved in wrongdoing. The Government also became entitled to seek discovery from the appellants which otherwise would have been unavailable. 21 U.S.C. § 881; *see Muhammed v. Drug Enforcement Agency*, 92 F.3d 648, 651 (8th Cir. 1996).

Reviewing the present case would give the Court occasion to clarify the circumstances in which the harsh and purposely punitive application of traditionally civil governmental sanctions implicate the Double Jeopardy Clause. A concurring opinion in *Hudson* noted "the settled proposition that the Government cannot use the 'civil' label to escape entirely the Double Jeopardy Clause's command," and observed:

> "That proposition is extremely important because the States and the Federal Government have an enormous array of civil administrative sanctions at their disposal that are capable of being used to punish persons repeatedly for the same offense, violating the bedrock double jeopardy principle of finality."

Id., 522 U.S. at 110-11 (Stevens, J., concurring). Another concurrence made reference to "the expanding use of ostensibly civil forfeitures and penalties under the exigencies of the current drug problems," and remarked on the "increasingly inviting prospect of . . . profit to the Government" through the application of those devices. *Id.*, 522 U.S. at 114 (Souter, J., concurring). The third concurring opinion observed that it is "quite possible that a statute that provides for a punishment that normally is civil in nature could nonetheless amount to a criminal punishment as applied in special circumstances." *Id.*, 522 U.S. at 116-17 (Breyer, J., concurring). Such governmental excess and abuse are realized in the post-conviction allegations of the present petitioners. Without refinement, the *Hudson* opinion may be destined to deprive

individuals against whom such official power is directed of a long-recognized avenue of constitutional redress.

CONCLUSION

The petitioners sought relief under § 2255 because the government had engaged in the confiscation of their property under the guise of civil forfeiture but with an indisputably punitive intent. The petitioners' allegations charge an intolerable pattern of behavior by federal law enforcement officials. If these claims are actionable under § 2255, as the petitioners have contended, it is egregious that the petitioners have not been afforded the opportunity to prove them and to secure the constitutional relief to which they are entitled. This petition should be granted so that any lack of clarity about the governing constitutional law may be resolved and so that the fundamental right at issue may be vindicated.

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UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 00-1799EMSL
No. 00-1800EMSL
No. 00-1802EMSL
No. 00-1803EMSL
No. 00-1804EMSL
No. 00-1805EMSL
No. 00-1807EMSL

Kevin Pleas, Willian [sic] Yancy Jones, Demetrius Jones, Lamar Howell, Demetrius Mack, Tonya Jones, and Sherdonna Jones,	*	Appeal from the United States District Court for the Eastern District of Missouri
Appellants,	*	
vs.	*	
United States of America,	*	
Appellee.	*	

Before BOWMAN, BEAM, and MORRIS SHEPPARD ARNOLD. Circuit Judges

JUDGMENT

(Filed July 28, 2000)

These appeals come before the court on appellants' applications for certificates of appealability. The court has carefully reviewed the original files of the district court, and the applications for certificate of appealability are denied. The appeals are dismissed.
(5361-010199)

July 6, 2000

:

A true copy
ATTEST: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KEVIN PLEAS, et al.,	)	
Movants,	)	
	)	Case No.
vs.	)	4:98CV1079 CDP
UNITED STATES OF AMERICA,	)	
Respondent.	)	

MEMORANDUM AND ORDER

(Filed Jan. 11, 2000)

This matter is before the Court on the motions of William Y. Jones, Kevin Pleas, Demetrius Jones, Lamar Howell, Demetrius Mack, Tonya Jones and Sherdonna Jones to vacate, set aside or correct their sentences pursuant to 28 U.S.C. § 2255.[1] The government has moved to dismiss the motions on the ground that movants are not entitled to post-conviction relief. In opposition to dismissal, movants request an evidentiary hearing and seek leave to conduct discovery.

Because the file and records of the case conclusively demonstrate that movants are not entitled to post-conviction relief, the Court will grant the government's motion

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[1] Although each movant initially filed a separate motion for post-conviction relief pursuant to § 2255, the Court consolidated all of the cases (Cause Numbers 4:98CV1080 through 4:98CV1085) with the instant action pursuant to a joint motion filed by the parties. The Court will issue separate judgments in each of the cases. This Memorandum and Order applies to all of the cases.

to dismiss and will deny movants' § 2255 motions without discovery or an evidentiary hearing.

Background Facts

The following background facts are drawn from the Court's review of the underlying criminal file (Cause Number 4:95CR246)[2] and the Eighth Circuit Court of Appeal's decision affirming movants' convictions and sentences on consolidated direct appeal. *See United States v. Jones*, 111 F.3d 597. (8th Cir. 1997).

Movants were originally named in July of 1995 in a single-count, indictment, charging fourteen defendants with conspiracy to distribute in excess of five kilograms of cocaine, in violation of 21 U.S.C. § 846. Following extensive discovery and motion practice, several defendants, not including the movants here, entered agreements to provide assistance to the government, including agreements to testify against the movants. Ultimately movants entered guilty pleas to charges set out in substitute informations. The pleas took place over a two-day period in February of 1996. The government dismissed the original indictment at the time of the sentencings. As part of their pleas, each movant also entered consent decrees of forfeiture to certain property. Because the evidence from the movants' pleas and sentencings is relevant to many of the claims raised here, the Court will

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[2] Although the Honorable George F. Gunn, Jr. was the presiding judge in the criminal case, the case was reassigned to the undersigned by Order dated November 10, 1998.

summarize in some detail the record of those proceedings.

Movant William Yancey Jones[3] pleaded guilty on February 21, 1996 to an information charging him with conspiracy to distribute over five kilograms of cocaine, which carried a sentence of ten years to life imprisonment. In his written plea agreement and orally at the plea hearing, he admitted criminal responsibility for over 750 kilograms of cocaine. His plea agreement included his agreement to plead guilty to the information, to forfeit certain property, and to make a "non-testimonial proffer" which could be used by the government for cross-examination should he be called to testify in a trial, in exchange for the government's recommendation of a sentence of 276 months. When his presentence report was prepared, however, it concluded that he had a base offense level of 38 with a criminal history category of III, resulting in an imprisonment range under the U.S. Sentencing Guidelines of 292 to 365 months. At the sentencing hearing held on June 7, 1996, the government attorney moved for a downward departure on the basis that the defendant's criminal history was overstated. The Court accordingly followed the prosecutor's recommendation that movant be sentenced to the 276 months agreed to in the plea agreement. Although the Court orally stated that it was granting the government's motion for a downward departure, the Judgment form signed by the Court included a statement of reasons page which recalculated the guidelines and reflected a finding

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[3] Movant William Yancey Jones is the father of movants Demetrius Jones, Tonya Jones, and Sherdonna Jones.

of a criminal history category II, so that the sentence imposed (as recommended by the government) did not reflect a departure but instead was the bottom of the new guidelines range.

Movant Kevin Pleas[4] pleaded guilty on February 20, 1996 to an information charging him with conspiracy to distribute over five kilograms of cocaine, which carried a sentence of ten years to life imprisonment. In his written plea agreement and orally at the plea hearing, he admitted criminal responsibility for over 700 kilograms of cocaine. His plea agreement included his agreement to plead guilty to the information, to forfeit certain property, and to make a "non-testimonial proffer," in exchange for the government's recommendation of a sentence in the amount of 180 months. His presentence report concluded that he had a base offense level of 35 with a criminal history category of I, resulting in an imprisonment range under the guidelines of 168 to 210 months. At the sentencing hearing on June 7, 1996, the Court sentenced him to 180 months in accordance with the plea agreement.

Movant Demetrius Jones pleaded guilty on February 22, 1996 to one count of possession with intent to distribute cocaine and two counts of possession with intent to distribute crack cocaine. The cocaine count carried a five to forty year potential sentence, and the crack cocaine counts each carried ten-year mandatory minimum sentences with the maximum potential for life imprisonment. His presentence report concluded that Demetrius Jones

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[4] Kevin Pleas is the father of one of the children of movant Tonya Jones.

had a total offense level of 31 with a criminal history category of III, and therefore had a range of imprisonment of 135 to 168 months. At the sentencing hearing on June 7, 1996, the government conceded defense counsel's objection that the criminal history category was overstated, and Demetrius Jones was sentenced to 121 months, based on the Court's finding that his criminal history category was II and so his guidelines range was 121 to 151 months.

Movant Lamar Howell pleaded guilty to conspiracy to distribute over five kilograms of cocaine, which carried a sentence of ten years to life imprisonment. In his written plea agreement and orally at the plea hearing, he admitted criminal responsibility for at least 50 but less than 150 kilograms of cocaine. Although the information and the plea agreement recited that the conspiracy began in 1989, at sentencing the government agreed that Howell was not involved in the conspiracy until 1993 so that he could be considered eligible for the provisions of the safety valve under § 5C1.2 of the sentencing guidelines.[5] As a result, his guidelines range was 108 to 135 months, and the court sentenced him to 116 month imprisonment.

Movant Demetrius Mack[6] pleaded guilty on February 21, 1996, to an information charging him with conspiracy to distribute over 5 kilograms of cocaine, which carried a sentence of ten years to life imprisonment. In his written

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[5] This concession meant that Howell did not commit this crime while on probation, which reduced his criminal history category to I, thus qualifying him for the safety valve.

[6] Demetrius Mack is the husband of movant Sherdonna Jones.

plea agreement and orally at the plea hearing, he admitted criminal responsibility for at least 50 but not more than 150 kilograms of cocaine. His plea agreement included his agreement to plead guilty to the information, to forfeit certain property, and to make a "non-testimonial proffer" to the government, in exchange for the government's recommendation of a sentence of 151 months. When Mack's presentence report was prepared, however, it concluded that he had a base offense level of 36 with a criminal history category of III, resulting in an imprisonment range under the guidelines of 235 to 293 months. At the sentencing hearing held on June 24, 1996, the government attorney asked the Court to depart downward in order to achieve the 151 month sentence agreed upon in the plea agreement. The Court stated: "All right. The Court will accept the government's request to be a motion for a downward departure of 151 months." Defense counsel then began to argue defendant's objections to the criminal history category and the presentence report's failure to give movant the benefit of acceptance of responsibility (which had been denied because of his bond revocation for, among other things, an arrest for possession of cocaine while on bond), but then agreed with the Court that those objections were moot since the Court had indicated its intent to grant the government's motion for a downward departure. The government then conceded the defendant's objections, and the Court recalculated the guidelines to show a total offense level of 33 and a criminal history category of II, resulting in a guidelines range of 151 to 188 months. The

Court then sentenced movant to 151 months in accordance with the plea agreement and the government's recommendation.

Movants Tonya Jones and Sherdonna Jones both pleaded guilty on February 20, 1996 to informations charging them with money laundering in violation of 18 U.S.C. § 1956. Each of their plea agreements included the government's agreement to recommend a sentence of 46 months. At the time of sentencing, however, each defendant had retained new counsel and sought a continuance in order to argue certain objections, including a request to withdraw their pleas. Both argued that their pleas lacked a factual basis and that they were guilty only of violating 18 U.S.C. § 1957. At the rescheduled sentencings on July 17, 1996, the government attorney agreed that they should be allowed to withdraw their pleas and proceed to trial on the original cocaine conspiracy indictment. The government also agreed that they could receive a minor role adjustment if they stayed with the money laundering plea, which would reduce their guidelines range to a minimum sentence of 37 months. The Court refused to allow them to plead guilty to § 1957, since they had not been charged with this crime. After consultation, both movants then, through counsel, indicated that they did not want to withdraw their pleas. (Transcript of Tonya Jones' sentencing p. 15) [doc. #549]; (transcript of Sherdonna Jones' sentencing p. 28-29) [doc. #548]). The Court then sentenced them each to 37 months.

Movants all appealed their convictions to the Eighth Circuit Court of Appeals, arguing that their convictions constituted double jeopardy in light of the civil forfeiture

proceedings against them. Demetrius Jones also challenged his sentence, and Tonya and Sherdonna Jones appealed the district court's denial of their motion to withdraw their pleas. The Eighth Circuit affirmed the convictions and sentences in a published opinion filed on April 16, 1999, *United States v. Jones*. 111 F.3d 597 (8th Cir. 1997).

Thereafter, movants, with the assistance of retained counsel, filed the instant motions pursuant to 28 U.S.C. § 2255, raising the following grounds for relief:

1) their convictions constituted double jeopardy in light of the civil forfeiture proceedings;

2) their imprisonment constitutes cruel and unusual punishment;

3) ineffective assistance of trial counsel by:

   a) failing to investigate and/or pursue evidence of illegal acquisition of evidence;

   b) failing to advise the Court of the coercive nature of the plea; and

   c) failing to investigate the punitive intent and effect of the forfeiture;

4) ineffective assistance of appellate counsel for failing to timely file a petition for certiorari to the United States Supreme Court following the Eighth Circuit's affirmance of their convictions and sentences on direct appeal (Sherdonna and Tonya Jones do not join in this allegation); and

5) violation of due process by the government's outrageous misconduct during the

course of the underlying criminal investigation.

Demetrius Jones raises the additional two grounds for relief:

1) The Sentencing Guidelines "which require sentencing sellers of crack cocaine to terms of imprisonment substantially longer than those imposed upon sellers of other forms of cocaine are founded improperly upon race-based criteria and deprive black persons found guilty of selling crack cocaine of their rights to due process of law and equal protection of the law and their right to be free from cruel and unusual punishment;" and

2) the government failed to satisfy its burden of proving "that the substance which the petitioner purportedly sold was crack cocaine as opposed to any other form of cocaine base."

Discussion

A. Voluntariness of Movants' Guilty Pleas

Movants' claims must be evaluated in light of the fact that they entered guilty pleas in the underlying criminal case.[7] "While a guilty plea taken in open court is not invulnerable to collateral attack in a post conviction proceeding, the defendant's representations during the plea-

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[7] Movants completely fail to address the impact of their guilty pleas upon their grounds for relief in this case. Despite movants' omissions, the Court finds it necessary to discuss the grounds for relief in relation to the voluntariness of their guilty pleas.

taking carry a strong presumption of verity and pose a formidable barrier in any subsequent collateral proceedings." *Nguyen v. United States*, 114 F.3d 699, 703 (8th Cir. 1997) (internal citations omitted); *see also United States v. Broce*, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and lawful sentence."). As the Supreme Court explained:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett Henderson, 411 U.S. 258, 267 (1973). Stated another way, a defendant who voluntarily pleads guilty waives all non-jurisdictional defects in the proceedings against him. *United States v. Cordero*, 42 F.3d 697, 699 (1st Cir. 1994) ("We have assiduously followed the letter and spirit of Tollett, holding with monotonous regularity that an unconditional guilty plea effectuates a waiver of any and all independent and non-jurisdictional lapses that may have marred the case's progress up to that point, thereby absolving any errors in the trial court's anteced nt rulings. . . . "). This waiver applies on direct appeal as well as motions for post-conviction relief brought pursuant to § 2255. *Johnson v. Petrovsky*, 626 F.2d 72, 73 (8th Cir. 1980) (post-conviction relief); *United States v. Jennings*, 12 F.3d 838, 839 (8th Cir. 1994) (direct appeal). For this reason,

collateral review of a guilty plea is ordinarily confined to whether the guilty plea was both counseled and voluntary. *Broce*, 488 U.S. at 569.

Likewise, the Court shall focus on whether movants' guilty pleas in the underlying case were both "counseled and voluntary." *Id.* While movants raise several claims of ineffective assistance of counsel[8], they do not otherwise allege that their guilty pleas were involuntary. The closest that movants come to such an assertion is the allegation that trial counsel was ineffective for failing to inform the Court of the allegedly coercive nature of the plea. To the extent that movants are attempting to assert that their pleas were rendered involuntary because of an alleged "undisclosed package plea" agreement, that argument has been squarely rejected by the Eighth Circuit in connection with the direct appeal of Sherdonna and Tonya Jones as follows:

> The record demonstrates that the plea hearings complied fully with the requirements of Federal Rule of Criminal Procedure 11. When asked if they had been coerced or forced into pleading, both Tonya and Sherdonna answered in the negative. When the district court fully informs a defendant of the rights he is waiving, and the defendant's statements at the plea hearing show that he knowingly and voluntarily pleaded

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[8] In fact, movants do not even directly assert that their counsel's alleged ineffective assistance rendered their guilty pleas involuntary. Nevertheless, the Court shall construe movants' motions liberally to claim a causal connection between the alleged ineffective assistance of counsel and the validity of their guilty pleas.

> guilty, the occasion for setting aside a guilty please should seldom raise . . .
>
> Neither Tonya nor Sherdonna made mention of any condition during their plea hearing, and they do not now offer any evidence corroborating their allegations of a secret coercive condition. In light of these circumstances, the district court did not abuse its discretion in denying the motion to withdraw the guilty pleas.

Jones, 111 F.3d at 602. (internal citations and quotations omitted). Because their claims have already been rejected by the [sic] not raise the issue again in this proceeding.[9] *Houser v. United States*, 508 F.2d 509, 514 (8th Cir. 1974) (holding that "any matter which has been decided adversely to the petitioner upon direct appeal is not cognizable under § 2255.")

The Eighth Circuit's reasoning applies with equal force to the rest of the movants. Like Tonya and Sherdonna Jones, all of the movants represented to the Court during their plea hearings that they had not been coerced or forced into pleading guilty.[10] Each written plea agreement, signed by each movant, stated that it was the

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[9] In the movants' reply brief, counsel states that Sherdonna Jones and Tonya Jones "have not joined in this allegation," and concedes that they cannot relitigate the issue. The allegation, however, is explicitly included in paragraph 22 of each of those movants' motions, so the Court has addressed it here.

[10] Judge Gunn conducted thorough plea colloqies with all movants, asking each whether he or she had been threatened or forced into waiving indictment, pleading guilty, or signing the stipulation of facts relative to sentencing and the consent to forfeiture. All movants therefore had numerous opportunities to inform the Court of an allegedly coercive plea agreement. In

complete agreement and that there were not other promises or inducements made by the government. Additionally, at each plea the Court asked each movant if there were any other agreements, and each said there were not. A review of the transcripts of the plea hearings reveals that all movants knowingly and voluntarily plead guilty after admitting their guilt and being fully informed of the rights that they were waiving. In each case, movants were afforded ample opportunity to advise the Court of the allegedly coercive nature of their plea agreement; in each case, however, movants failed to do so. In light of these circumstances, the Court finds that the guilty pleas of William Jones, Demetrius Jones, Pleas, Howell and Mack were not rendered involuntarily through the existence of an alleged undisclosed package plea agreement.[11] *See Jones*, 111 F.3d at 602. Because movants' guilty pleas were voluntary, the Court must now decide whether they received effective assistance of counsel in the plea process. As discussed below, the Court finds that they did.

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all cases, however, movants affirmed the voluntary nature of their guilty pleas.

[11] Although the Court has rejected movants' claim on the merits it also notes that they have procedurally defaulted on this claim because they did not raise it on direct appeal. The failure to raise an issue on direct appeal acts to bar a petitioner from raising that issue for the first time in a subsequent § 2255 motion absent a showing of cause and prejudice sufficient to avoid the procedural bar. *Rogers v. United States*, 1 F.3d 697, 699 (8th Cir. 1993). Because movants have made no attempt to assert cause and prejudice to overcome the procedural default, their claim also fails for this alternative reason.

B. Ground 3 – Ineffective Assistance of Trial Counsel Claims

To state a claim for ineffective assistance of counsel, petitioner must establish that his counsel's performance was deficient and that the deficient performance prejudiced his defense *Strickland v. Washington*, 466 U.S. 668, 700 (1984). To decide whether counsel's performance was constitutionally deficient, the inquiry must be whether, in light of all the circumstances, the identified acts or omissions fell outside the range of professionally competent assistance. *Id.* at 690. In determining whether counsel's conduct was objectively reasonable, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish the requisite degree of prejudice, petitioner must demonstrate that the decision reached would likely have been different absent counsel's error. *Id.* at 694; *Griffin v. Delo*, 33 F.3d 895, 900 (8th Cir. 1994), *cert. denied*, 514 U.S. 1119 (1995). In the context of a guilty plea, petitioner satisfies this prong of the *Strickland* test only by showing that, but for counsel's errors, "he would not have pleaded guilty and would have insisted on going to trail." *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

Movants' claims that their attorneys did not represent them effectively are flatly contradicted by their contemporaneous statements at the plea hearings:

Defendant Tonya Jones:

THE COURT: Mr. Neill has been representing you in this matter. Are you fully satisfied with his

representation of you in this case?

THE DEFENDANT: Yes sir.

(Tr. at 9) [doc. # 504].

Defendant Pleas:

THE COURT: Mr. Rosenblum has been representing you in this matter. Are you fully satisfied with his representation of you?

THE DEFENDANT: Yes.

(Tr. at 7) [Doc # 483].

Defendant William Jones:

THE COURT: And Mr. Sindel has been representing you in this matter?

THE DEFENDANT: Yes, sir.

THE COURT: Are you fully satisfied with this representation of you in this matter?

THE DEFENDANT: I am.

(Tr. at 10) [doc. # 460].

Defendant Sherdonna Jones:

THE COURT: Mr. Gorla has been representing you in this matter. Are you fully satisfied with his representation of you in this case?

THE DEFENDANT: Yes.

(Tr. at 8) [doc # 500].

Defendant Mack:

THE COURT: Miss Murphy has been representing you in this matter. Were you fully satisfied with her representation of you in this case?

THE DEFENDANT: Yes.

(Tr. at 10) [doc. # 576].

Defendant Demetrius Jones:

THE COURT: Mr. Fredman has been representing you in this matter; is that correct?

THE DEFENDANT: Yes.

THE COURT: Are you fully satisfied with his representation of you in this case?

THE DEFENDANT: Yes.

(Tr. at 8-9) [doc #458].

Defendant Howell:

THE COURT: Mr. Dudley has been representing you in this matter. Are you fully satisfied with his representation of you in this case?

THE DEFENDANT: Yes, I am.

(Tr. at 9) [doc. # 577].

The record at the plea hearings supported these statements, and movants' present allegations of ineffective assistance of counsel fail "to overcome the strong presumption of verity that attached to statements made in

open court." *Nguyen*, 114 F.3d at 704 (internal quotations omitted).

Moreover, the Court notes that movants were facing substantial sentences but received substantial benefits as a result of "an objectively prudent plea negotiation." *id.* Indeed, as the records of the sentencings and pleas reflect, the prosecution made substantial concessions to the movants. All movants were facing ten year mandatory minimum sentences, yet three received lower sentences. The undersigned believes that an objective view of the record shows that counsel negotiated very substantial reductions in sentence for each defendant. At least four co-defendants had already agreed to plead guilty and testify against the movants at the time movants entered their pleas. Those co-defendants received downward departure motions for their substantial assistance in this case, and received sentences ranging from two to five years as a result. The government's motions for downward departure for the co-defendants state that the co-defendants' anticipated testimony at trial was a significant factor in the decision by the remaining defendants (movants here) to enter their pleas. Thus, given the strong evidence the government had available, including testimony from multiple participants in the conspiracy, each defendant was facing a substantial likelihood of conviction. Had they been convicted following trial, no defendant would have received the adjustments for acceptance of responsibility that they in fact got, so their sentences would have been considerably longer based on that factor alone. Additionally, it is unlikely that the prosecution would have made the concessions it did with

regard to sentencing factors if movants had been convicted after a trial. From the undersigned's review of the presentence reports and the sentencing transcripts, it is clear that had the government chosen to litigate, rather than concede the sentencing issues, it would have prevailed on most, if not all, of those issues.[12] Of course, movants Tonya and Sherdonna Jones obtained new counsel after their pleas and were given the opportunity to withdraw their pleas and go to trial on the original indictment, but they declined that offer. The Court in each case sentenced the movant to the amounts agreed to in the plea agreements, and in the case of Tonya and Sherdonna Jones, to several months fewer than had been agreed to at the time of the plea. In all cases except that of Lamar Howell, the judge sentenced movants to the bottom of their guidelines ranges, and readily agreed to objections in order to reach lower ranges, thus allowing the plea agreements to be met.

Most importantly, of course, each movant admitted in open court that he or she was guilty as charged. The defendants admitted to being responsible for the drug quantities stated in the plea agreements and did not dispute the government's statement that even larger quantities could probably have been proven at trial. Given the strength of the evidence, including co-conspirator testimony, the Court cannot agree that the counsel were ineffective for failing to negotiate a better deal.

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[12] For example, it is highly unusual for a drug defendant to receive an acceptance of responsibility adjustment under U.S.S.G. § 3E1.1 when he has been arrested for a drug offense while awaiting sentencing, as Demetrius Mack was.

1. Ineffective assistance of counsel for failing to investigate and/or pursue evidence of illegal acquisition of evidence

Movants contend that their attorneys were ineffective for allegedly failing "to conduct reasonable investigation and discovery proceedings which might have revealed the substantial weaknesses of the Government's case, especially the illegal acquisition of all or most of the prosecution evidence in view of the falsification of affidavits and search warrants and telephone interception orders and the other illegal activities of investigators described in this petition. . . . " According to movants, their attorneys were ineffective for failing to discover the alleged misconduct that forms the basis for Ground 5 of their motion.

An attorney's decision not to investigate every lead before his client decides to plead guilty may fall within his "sphere of decision making as an attorney." *United States v. Carr,* 80 F.3d 413, 418 (10th Cir. 1996). The Supreme Court explained the rationale underlying this rule as follows:

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry. And just as it is not sufficient for the criminal defendant seeking to set aside such a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, . . . it is

> likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.
>
> The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law.

Tollett, 411 U.S. at 267-68 (internal citations omitted).

Movants' conclusory assertions about the performance of their attorneys are not only contradicted by their statements at the plea hearing, they are also contradicted by the criminal file. Following the magistrate judge's order requiring the government to file a written notice of all arguably suppressible evidence, counsel for movants filed a plethora of motions to suppress and for additional discovery. Most of these motions involved the suppression of the evidence which movants contend was illegally obtained. Therefore, despite their protestations to the contrary, the record reveals that movants decided to plead guilty after the suppression issues had in fact been raised by their attorneys. Accordingly, movants have failed to meet the first prong of the *Strickland* test by demonstrating deficient performance.

Even if the Court assumes that the attorneys did not uncover the extent of the government's alleged misconduct until after entry of the guilty pleas, movants still fail to satisfy the prejudice prong of the *Strickland* test. The crux of this ineffective assistance of counsel claim is that counsel allegedly failed to discover information which could have aided the evaluation of the possibilities of success at trial. As the Sixth Circuit has observed:

> [A] plea decision is not made with any perfect knowledge of the results were a trial to be held. Both [petitioner] and his attorney had to know that if they had proceeded to trial, any number of events might have intervened to affect the final outcome. Favorable or unfavorable rulings on the evidence might have been rendered; witnesses favorable to the defense or to the prosecution may have died awaiting trial or have become otherwise unavailable. New witnesses might have come forward; known witnesses might have recanted. The evidence of the prosecution might have taken entirely unpredicted turns to the favor or prejudice of the government's case. These are trial's unknown risks and dangers which the plea bargaining process seeks to remove. By entering the plea [petitioner] was foregoing the possibility that any such events would have resulted in a not guilty verdict.

Campbell v. Marshall, 769 F.2d 314, 324 (6th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986) (cited in *White v. United States*, 858 F.2d 416 (8th Cir. 1988), *cert. denied*, 489 U.S. 1029 (1989)).

Thus, the remaining question is whether counsels' alleged errors affected movants' decisions to plead guilty.

While counsels' failure to uncover the alleged governmental misconduct might have lessened movants' abilities to evaluate their chances for success at trial, "the information that was available to [movants] at the time convinced [them] to plead guilty." *Id.* at 424 (denying § 2255 motion on grounds that *Brady* violations rendered plea involuntary because the undisclosed information did not undermine factual basis for plea or movant's decision to enter plea). Despite the pendency of numerous pretrial motions (including motions to suppress), movants decided to plead guilty even though they knew it was a possibility that some, if not all, of the government's evidence could be excluded from trial. That movants now claim that their attorneys failed to discover the extent of the alleged governmental misconduct or, stated another way, the strength of their motions to suppress, does not negate the factual bases for their guilty pleas. Thus, the Court cannot conclude that counsels' discovery of the alleged governmental misconduct "would have been controlling in the decision whether to plead." *Id.* Because movants cannot meet the second prong of the *Strickland* test, their ineffective assistance of counsel claim fails.

2. Ineffective assistance of counsel for failing to advise the Court of the coercive nature of the plea

Movants also contend that their attorneys were ineffective for failing to advise the Court of the allegedly coercive nature of the plea agreement. Because the Court has already concluded that there was no secret plea agreement, counsels' performance is not constitutionally deficient as a matter of law. *See United States v. Apfel*, 97

F.3d 1074, 1076 (8th Cir. 1996) (holding that ineffective assistance of counsel claims fail if either prong of *Strickland* test fails).

3. Ineffective assistance of counsel for failing to investigate the punitive intent and effect of the forfeiture

Movants finally contend that their trial attorneys were ineffective for failing "to investigate and develop evidence" of the punitive nature of the civil forfeiture proceedings against them in connection with their double jeopardy claim. As discussed below in connection with Ground 1, this claim has already been rejected on its merits by the Eighth Circuit. For this reason, movants cannot meet either prong of the *Strickland* test.

Movants attempt to circumvent the preclusive effect of the Eighth Circuit's ruling by arguing that their attorneys were ineffective for failing to discover the kind of evidence that could have possibly proven their double jeopardy claim. However, movants do not specify what evidence their attorneys allegedly should have uncovered, nor do they indicate how the additional evidence, if discovered, would have persuaded them to plead not guilty. Their conclusory assertions of the existence of alleged evidence of governmental misconduct are simply insufficient to warrant relief or an evidentiary hearing on this claim.

Moreover, movants' latest arguments regarding the allegedly punitive intent and effect of the civil forfeiture proceedings have already been rejected on their merits by the Honorable Donald J. Stohr in the case styled *United*

States v. Two Hundred Eighty One Thousand One Hundred Thirty Dollars, Cause Number 4: 96CV1907 DJS. In that case, Judge Stohr entered summary judgment in favor of the United States government and against claimant William Jones and ordered the defendant $281,130.00 forfeited to the United States pursuant to 21 U.S.C. § 811(a)(6). This determination was affirmed on appeal to the Eighth Circuit in an unpublished opinion dated May 12, 1998. Thereafter, claimant Jones sought reconsideration several times on the grounds that he had obtained "newly discovered" evidence of governmental misconduct. The alleged governmental misconduct included the falsification of the California search warrant and the illegal wiretaps complained about in the instant case. Judge Stohr, after reviewing the evidence of the alleged misconduct, rejected these claims as without merit. [Doc. # 77]. This Court agrees and finds that movants' attorneys were not ineffective for failing to develop this evidence in conjunction with their double jeopardy claims. This ground of movants' § 2255 motion therefore fails.

C. Ground 4 – Ineffective Assistance of Appellate Counsel Claims

Movants, with the exception of Sherdonna and Tonya Jones, also contend that appellate counsel was ineffective for failing to timely file a petition for certiorari to the United States Supreme Court appealing the Eighth Circuit's decision in *United States v. Jones,* 111 F.3d 597 (8th Cir. 1997). Because the United States Supreme Court's review of federal criminal cases by certiorari is discretionary, there is no constitutional right to the assistance of

counsel. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). Where there is no right to counsel, there is no right to the effective assistance of counsel. *Wainright v. Torna*, 455 U.S. 586, 587-88 (1982). Accordingly, Ground 4 of the motion will be denied.

D. Ground 5 – Movants' Claim of Governmental Misconduct

Because their guilty pleas are valid, movants have waived all non-jurisdictional challenges to the prosecution of their case, including all challenges to the alleged unconstitutional searches and seizures and other governmental misconduct that they now allege occurred during the course of the investigation. *See Petrovsky*, 626 F.2d at 73 (valid guilty plea bars habeas challenge to allegedly unconstitutional search and seizure that occurred during the course of the criminal investigation); *Jennings*, 12 F.3d at 838 (same); *Cordero*, 42 F.3d at 699 ("[A] jurisdictional defect is one that calls into doubt a court's power to entertain a matter, not one that merely calls into doubt the sufficiency or quantum of proof relating to guilt."). Thus, to the extent that movants are attempting to litigate issues involving the constitutionality of the searches and seizures and other alleged governmental misconduct that occurred prior to entry of their guilty pleas, these claims fail. *See Iron Wing v. United States*, 34 F.3d 662, 664 n.2 (8th Cir. 1994).

The only potential ground for habeas relief asserted in Ground 5 of their motion is the claim that the prosecutor failed to disclose exculpatory evidence, presumably in

violation of *Brady v. Maryland*, 373 U.S. 83 (1963).[13] In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment." *Id.* at 87. Moreover, the prosecution may not elicit or fail to correct false testimony. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972). In the present case, movants contend that the prosecution failed to disclose the following evidence: 1) Special Agent Moore's alleged falsehoods in connection with the investigation of this case;[14] and 2) Special Agent Hook's false statements regarding the existence of a confidential informant in conjunction with obtaining the California search warrant that led to the seizure of evidence used against movants in this case.

In *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988), *cert. denied*, 489 U.S. 1029 (1989), the Eighth Circuit held that the entry of a guilty plea does not foreclose a

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[13] Once again, movants failed to articulate that their pleas were rendered involuntary because of alleged *Brady* violations, but the Court has construed their § 2255 motion liberally to allege such a causual connection.

[14] Movants also argue that the prosecution failed to disclose evidence of Agent Moore's "propensity for deceit." In support of this assertion, movants point to allegations of misconduct made against Agent Moore in a case pending in the Southern District of Illinois styled *United States v. Lipscomb*, Cause Number 97-CR-30010 WDS. Even assuming that the allegations in that case constituted "evidence of Agent Moore's propensity for deceit" and that this evidence should have been disclosed under *Brady*, this argument still fails because the court concluded that Agent Moore had not engaged in any misconduct in connection with that case.

collateral attack upon the plea based on claimed *Brady* violations, but that habeas relief on this ground "would clearly be the rare exception." *Id.* In reaching its decision, the Eighth Circuit adopted the Sixth Circuit's analysis in *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985). In *Campbell*, petitioner pled guilty to two counts of murder after shooting his former wife and her male companion. *Id.* at 315-16. Petitioner claimed that he had been warned that his ex-wife's boyfriend had a gun and was looking for him, but at his plea hearing petitioner told the court that he killed them because they were together. *Id.* at 316. Before petitioner decided to plead guilty, his counsel made a specific written request for disclosure of exculpatory evidence. After pleading guilty, petitioner discovered that a gun was found by police on the body of the boyfriend. Although the prosecutor was aware of the gun and had it in his possession, he did not disclose the gun to petitioner or his counsel upon request. *Id.*

Petitioner then sought habeas relief on the ground that the prosecutor's failure to disclose the existence of the gun violated the *Brady* rule and rendered his plea involuntary. Although the Sixth Circuit assumed that petitioner could have established a *Brady* violation had he gone to trial and been convicted, it nevertheless concluded that the prosecutor's failure to disclose the exculpatory evidence did not render the habeas petitioner's guilty plea involuntary. *Id.* at 324. In support of its holding, the Sixth Circuit noted that the belated discovery of information did not detract from the "credible factual basis" for his plea and that petitioner was represented by competent counsel. *Id.* at 321-22.

Under these standards, movants' claim must fail. Initially, it is less than clear that the evidence allegedly withheld from movants in this case would even constitute the kind of evidence that must be disclosed under *Brady*. Even assuming that the evidence should have been disclosed, however, the belated discovery of the information does not detract from the factual bases for movants' pleas. As in *Campbell* and *White*, the movants admitted the facts supporting their guilty pleas at the colloquy hearings. These admissions, made under oath and in open court, fully established their guilt and are entitled to great weight, *see Campbell*, 760 F.3d at 331. Because the Court has previously concluded that movants' counsel were not ineffective for allegedly failing to discover this information, the only "remaining question is whether [movants'] knowledge of the undisclosed material would have affected [their] decision to forego trial." *White*, 858 F.2d at 424. Although the non-disclosure may have lessened their ability to evaluate the chance for success at trial, the information that was available to movants at the time, including that at least four co-conspirators had agreed to testify against them, convinced them all to plead guilty. Thus, the Court cannot conclude that the undisclosed evidence "would have been controlling in the decision whether to plead." *Id.* For this reason, Ground 5 of movants' motion fails.

E. Ground 1 – Double Jeopardy Claim

Movants also contend that their convictions constituted double jeopardy in light of the civil forfeiture proceedings against them. This claim was rejected by the Eighth Circuit on direct appeal as follows:

In support of their argument that the civil proceedings were punitive, appellants contend that the government instituted civil forfeiture proceedings as preparation for eventual criminal forfeitures. Appellants allege that the stay of the civil forfeiture proceedings which the government obtained in light of the criminal proceedings shows that the civil forfeiture proceedings were in fact an integral part of the criminal proceedings and were therefore punitive.

This argument defeats itself on two fronts. First, the fact of the stay undermines rather than supports the double jeopardy challenge, for a stay of forfeiture proceedings prevents the attachment of jeopardy. Second, appellants' argument that the civil forfeiture proceedings were related to the criminal proceedings defeats their double jeopardy claims. A single coordinated prosecution involving both civil and criminal proceedings does not violate the double jeopardy clause, as the civil and criminal proceedings in such a situation are merely different aspects of a single prosecution. In this case, the temporal link and the coordination between the civil forfeiture proceedings and the indictments satisfy us that the actions were different aspects of the same prosecution and that the civil forfeiture proceedings were not separate and punitive. Because both the stay and the coordination between the civil forfeiture proceedings and criminal prosecutions prevented jeopardy from attaching as a result of the civil forfeiture proceedings, the subsequent criminal proceedings would not, even before Ursery, have constituted double jeopardy.

Jones, 111 F.3d at 599-600 (internal citations and quotations omitted). Because movants' double jeopardy claim has been rejected by the Eighth Circuit in connection with their appeal of their underlying criminal case and the civil forfeiture proceedings, it may not be relitigated in the instant proceeding. *See Houser*, 508 F.2d at 514. Accordingly, Ground 1 of movant's § 2255 motion fails.

F. Ground 2 – Cruel and Unusual Punishment

Movants also contend that their imprisonment constitutes cruel and unusual punishment in violation of the Eighth Amendment "because the intentional conduct of Agent Moore in his official capacity as a law enforcement official of the [g]overnment created a foreseeable risk of injury or assassination rendering every American penal institution unsafe for the incarceration of Mr. Jones, Mr. Pleas, and persons related to or associated with them." According to movants, Agent Moore placed them at risk of injury or assassination "at all times in any federal prison" by informing the news media and certain individuals under investigation during this case that William Jones: 1) had been prosecuted for drug trafficking in the past; 2) had chosen to cooperate with the federal authorities in the underlying investigation of the "Jones Organization;" and 3) was a participant in the Federal Witness Protection Program.[15]

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[15] The publicly filed transcripts of Tonya and Sherdonna Jones' sentencings contain numerous references, raised by those movants, about their allegedly "disadvantaged" childhoods caused, in part, by their father's involvement in the Witness Protection Program. Thus, movants themselves exposed this fact to the public.

At first glance, movants appear to be challenging the conditions of their confinement, a claim not cognizable in a § 2255 proceeding. *See Williams v. Hopkins*, 130 F.3d 333, 335 (8th Cir. 1997). However, the Court will construe this allegation as a § 2255 claim because it challenges the fact of movants' imprisonment. Essentially, movants are claiming that Agent Moore's alleged misconduct renders the very fact of their imprisonment cruel and unusual punishment. Not surprisingly, movants have offered no legal authority in support of this assertion, and the Court's own research has disclosed none. This Court is unwilling to conclude that movants' imprisonment at any penal institution in the country would constitute cruel and unusual punishment based on movants' conclusory assertions to the contrary, particularly in light of the fact that movants have now been incarcerated since 1996 and have not been "assassinated." Ground 5 of the motion will be denied.

G. Demetrius Jones' Sentencing Claims

Demetrius Jones separately attacks his sentence by asserting two additional grounds for relief. Both are without merit.

Fist [sic], Demetrius Jones claims that his sentence violates both his equal protection and due process rights because the sentencing guidelines treat crack cocaine differently than powder cocaine, which has a disparate impact upon African-Americans. Because Demetrius Jones did not raise this claim on direct appeal, it is procedurally defaulted and this Court may not consider it absent an adequate showing of cause and prejudice. *See*

Apfel, 97 F.3d at 1076; *Rogers*, 1 F.3d at 699; *Reid v. United States*, 976 F.2d 446, 448 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (denying § 2255 motion because movant failed to raise errors on direct appeal and did not show cause or prejudice to excuse procedural default). Movant has made no attempt to excuse the procedural default of this claim, so it will be denied.[16]

Second, Demetrius Jones argues that the government failed to satisfy its burden of proving "that the substance which the petitioner purportedly sold was crack cocaine as opposed to any other form of cocaine base." Even if the Court assumes that this claim is properly raised in a § 2255 motion, it nevertheless fails as a matter of law because the Eighth Circuit has already decided it adversely to movant on direct appeal. *See Jones*, 111 F.3d at 601 ("We are satisfied that the lab report and Demetrius Jones' admissions during the plea colloquy and in the stipulation of facts provided an adequate basis for the district court's finding that the substance distributed was crack cocaine.").

Certificate of Appealability

Under 28 U.S.C. § 2253, an appeal may not be taken to the court of appeals from the final order in a § 2255

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[16] Although the Court need not, and does not, address movants' claim on the merits, it notes that his argument has been squarely rejected by the Eighth Circuit Court of Appeals in other cases. *See United States v. Smith*, 82 F.3d 241, 244 (8th Cir.), *cert. denied*, 519 U.S. 856 (1996); *United States v. Jackson*, 67 F.3d 1359, 1367 (8th Cir. 1995); *United States v. Clary*, 34 F.3d 709, 710 (8th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1172 (1995).

proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). To grant such a certificate, the justice or judge must find a substantial showing of the denial of a federal constitutional right. *Id.* at § 2253(c)(2); *see Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir.), *cert. denied*, 513 U.S. 946 (1994)). The Court is of the opinion that none of the movants have made such a showing as to the grounds raised in their motions. It will therefore not issue a certificate of appealability.

Accordingly,

IT IS HEREBY ORDERED that the government's motion to dismiss [#6] is granted.

IT IS FURTHER ORDERED that the motions of William Y. Jones, Kevin Pleas, Demetrius Jones, Lamar Howell, Demetrius Mack, Tonya Jones and Sherdonna Jones to vacate, set aside or correct their sentences pursuant to 28 U.S.C. § 2255 are denied, and their motions are dismissed with prejudice.

IT IS FURTHER ORDERED that this Court will not issue a certificate of appealability, as movants have not made a substantial showing of the denial of a federal constitutional right.

IT IS FURTHER ORDERED that all other pending motions are denied.

Separate judgments in accordance with this Memorandum and Order are entered this same date in this case and in the following cases: 4:98CV1080 (*William Yancey Jones v. USA*); 4:98CV1081 (*Demetrius Jones v. USA*); 4:98CV1082 (*Lamar Howell v. USA*); 4:98CV1083 (*Demetrius Mack v. USA*); 4:98CV1084 (*Tonya Jones v. USA*); and 4:98CV1085 (*Sherdonna Jones v. USA*).

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 11th day of January, 2000.